LIBRARY
SUPREME COURT, U. S.

No. 73-433

FILED
NOV 19 19

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT E. HARNEY AND JOSEPH C. BOULDER,
PETITIONERS

v.

JOHN F. GRINER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-433

ROBERT E. HARNEY AND JOSEPH C. BOULDER,
PETITIONERS

v.

JOHN F. GRINER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

1. Petitioners were officers of Local 2340, American Federation of Government Employees (AFGE), which represented employees within the Bureau of Hearings and Appeals (BHA) of the Social Security Administration, Department of Health, Education, and Welfare (HEW). Petitioners, who were also employees of BHA, had been spending full time on union business from 1966 to August 1970.

Pursuant to Section 20 of E.O. 11491, 34 Fed. Reg. 17605, 17614, which became effective on January 1,

1970,[1] and HEW's amended Personnel Instruction on union activities issued on April 1, 1970,[2] BHA issued a memorandum on August 3, 1970, revising its policy on the "Use of Official Time" for union business (Appendix, *infra*, p. 9). That memorandum provided in substance that union officials must spend their normal duty hours on government work unless they are authorized by their supervisors to conduct union business. The memorandum set forth the types of union activities for which authorization could be approved, such as labor-management meetings, preparation for formal hearings on employee discipline, and the handling of informal grievances.

BHA had furnished to petitioner Harney a draft of this memorandum on July 21, 1970, had sought

---

[1] Section 20 of E.O. 11491 provides:

> *Use of official time.* Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management.

The references in this brief to E.O. 11491 are to the text as it read during 1970. For the current text, see 3 C.F.R., Ch. IV, Codified Presidential Documents, E.O. 11491.

[2] Personnel Instruction 711-1, § 711-1-180, as amended on April 1, 1970, provided in pertinent part:

> Employees who perform as representatives of labor organizations are Federal employees and as such are expected to accomplish the duties assigned to them. They will be permitted a reasonable amount of time to prepare and present identifiable grievances, appeals, and other representations.

his comments, and asked if Harney wished a meeting to discuss the draft. Gov. App. 16I-1.[3] Harney, however, wrote directly to the Secretary of HEW (with a copy to BHA) discussing complaints against the acting director of BHA, and expressing criticism of BHA's proposal. Gov. Ex. 3, Att. C.

Subsequently on September 11, 1970, the acting Director of BHA wrote to petitioner Harney expressing his readiness to discuss "the question of the use of official time * * * looking to a new agreement under the provisions of E.O. 11491." Gov. Ex. 3, Att. D.

In the meantime, petitioners continued to devote themselves exclusively to union business without complying with the terms of BHA's August 3 memorandum. As a result, beginning in August 7, 1970, BHA carried petitioners as absent without leave (Pet. App. Ex. C, 12a).

Petitioners instituted this suit in the district court seeking, *inter alia*, back pay for the period for which petitioners had been placed in the absent without leave status.[4]

---

[3] The reference "Gov. App." is to the appendix to the government's brief in the court of appeals. The reference "Gov. Ex." is to the Exhibits filed by the Government in the district court.

[4] Petitioners' complaint also relief sought from the government officials and AFGE President Griner with respect to such matters as the revocation of the Local's charter and its right to dues collected by means of the check-off (Pet. App. Ex. C, 13a). While those claims represented a very substantial part of petitioners' claims below, petitioners no longer assert them in this Court.

The district court dismissed petitioners' claim that BHA had improperly placed them in absent without leave status, on the ground that this claim was based on an Executive Order of the President, E.O. 11491, and thus did not involve a justiciable controversy, citing *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F. 2d 451, 456-457 (C.A.D.C.), certiorari denied, 382 U.S. 978 (Pet. App. Ex. B, 4a). The court of appeals affirmed (Pet. App. Ex. A, 1a-2a).

2. The decisions below are correct and further review by this Court is not warranted.

a. Petitioners' claim against the Government, as reflected in their complaint, boils down to the assertion that BHA had improperly interpreted and implemented the "Use of Official Time" provision of E.O. 11491. Thus, the district court correctly declined jurisdiction of this labor-management dispute under the principles of *Manhattan-Bronx Postal Union* v. *Gronouski*, *supra*.[5] In *Manhattan-Bronx* the court of appeals had held that the predecessor Executive Order (No. 10988) did not create judicially enforceable rights, and that disagreements as to implementation of the order had to be resolved within the Executive Branch.

---

[5] The preclusion of jurisdiction confirmed by *Manhattan-Bronx* was later held subject to an exception where plaintiff claims that the administration of the Executive Order "clashes with basic constitutional safeguards." *National Association of Government Employees* v. *White*, 418 F. 2d 1126, 1130 (C.A.D.C.). Petitioners did not rely in the district court upon any invasion of constitutional rights, and the court thus correctly found *Manhattan-Bronx* dispositive of their claim against the government.

b. Moreover, even assuming *arguendo* that petitioners' claim was justiciable, dismissal was in any event required for the additional reason that petitioners did not exhaust the administrative remedies provided by E.O. 11491. Petitioners' claim, that the government improperly withheld their salaries for engaging in union activities, falls within the unfair labor practices set forth in E.O. 11491.[6] The Executive Order vests primary jurisdiction over such unfair labor practices in the Assistant Secretary of Labor for Labor-Management Relations (Section 6), and thereafter in the Federal Labor Relations Council (Section 4). Petitioners admittedly did not seek relief under these provisions of E.O. 11491. Dismissal of their action was therefore mandated by the principle of exhaustion of administrative remedies. *E.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51; *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279, 296-297; *McKart* v. *United States*, 395 U.S. 185, 193-195.

---

[6] Section 19(a)(1) makes it an unfair labor practice to "interfere with, restrain, of coerce an employee in the exercise of the rights assured by this Order." Section 1, in turn, guarantees the employee "the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization * * * and each employee shall be protected in the exercise of this right. Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to participation in the management of the organization * * *."

In addition, Section 19(a)(2) makes it an unfair labor practice to "encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment."

c. Finally, petitioners also contend that their Due Process rights were violated when their pay was withheld without a prior evidentiary hearing (Pet. 7). However, this Due Process question was not presented to the district court; accordingly, the question was not timely asserted in the court of appeals, nor is it properly before this Court. Cf. *United States* v. *Tucker Truck Lines*, 344 U.S. 33.

In any event, there is no merit to petitioners' Due Process argument. As the petition makes clear (Pet. 4-5), petitioners' challenge to the administrative action presents only questions of law relating to the proper interpretation of E.O. 11491 and related instructions; no material facts are in dispute. See Pet. 4-5, 6-8. Thus, there was no occasion for a prior evidentiary hearing since such a hearing would be required by due process only where "important decisions turn on questions of fact." *Goldberg* v. *Kelly*, 397 U.S. 254, 269; *Mills* v. *Richardson*, 464 F. 2d 995, 1001 (C.A. 2). In all events, petitioners were afforded a prior opportunity to comment on BHA's August 3 memorandum, which restricted the use of official time for union matters, and then were invited thereafter to negotiate a new agreement with respect to the use of official time. These opportunities for discussion, together with the procedures available under E.O. 11491 for resolution of the unfair practices, afforded due process for resolution of petitioners' claim to payment of their full government salaries while they pursued only union business. See, *Fuentes* v. *Shevin*, 407 U.S. 67, 96-97; *Board of Regents* v. *Roth*, 408 U.S. 564, 570.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[7]

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

[7] A different Due Process question is raised by *Phillips* v. *Kennedy*, No. 72-1118, which deals with the procedural rights of employees who are removed under the provisions of the Lloyd-LaFollette Act, 5 U.S.C. 7501. Unlike *Kennedy*, the present case does not involve removal, or employee rights under the Lloyd-LaFollette Act. Moreover, in direct contrast to the employee in *Kennedy*, petitioners here did not timely assert their Due Process contention. There is therefore no reason for the Court to defer consideration of this petition pending final disposition of *Kennedy*.

APPENDIX

MEMORANDUM

DATE: Aug. 3, 1970

REFER TO: HA:BD

TO : See Below

FROM : Charles M. Erisman, Acting Director
Bureau of Hearings and Appeals

SUBJECT: Use of Official Time

The Department has issued new instructions which require that we review the use of official time by the officials of AFGE Local #2340.

The new Instruction 711-1, "Labor-Management Relations in the Federal Service," states in part:

> "Employees who perform as representatives of labor organizations are Federal employees and as such are expected to accomplish the duties assigned to them. They will be permitted a reasonable amount of time to prepare and present identifiable grievances, appeals, and other representations."

All prior Bureau instructions on the use of official time by officials of AFGE Local #2340 are hereby revoked. Unless authorized in accordance with the provisions of this memorandum, Union officials are required to be at their work stations performing their assigned duties except, of course, for short absences accorded all employees, e.g., coffee breaks. Outlined below is the procedure for granting official

time to Union officials in BHA to conduct union-management activities.

1. *Meetings requested by management*

   Formal meetings requested by management officials (e.g. Bureau Director, Assistant Bureau Directors, etc.)—Management official calling the meeting should arrange for use of time by having the labor relations specialist contact the Union official's first line supervisor. Official time for recurring or regularly scheduled meetings between the Union and management will be arranged in the same way.

2. *Meetings requested by the Union*

   In cases where the Union wishes to initiate a meeting with management officials, they should get in touch with the management official concerned and request the meeting. That official will arrange for official time by contacting the Union representative's first line supervisor through the labor relations specialist.

3. *Formal hearings*

   Time needed to prepare for formal hearings (discrimination, adverse action, grievance)—Union should make request to hearing coordinator or the labor relations specialist (in cases where there is no coordinator) and that official should notify the first line supervisor of the time authorized for preparing the case.

4. *Informal complaints and grievances of employees*

   Union should notify first line supervisor of fact that Union assistance is requested by an em-

ployee. Union should provide following information when requesting time:

(1) The nature and type of the complaint and the branch where the complaint originated, or in lieu of this information, at the option of the Union, the name of the employee(s) involved.

(2) Where Union official can be reached.

(3) Amount of time needed (approximate).

This information should be supplied to first line supervisor before Union representative leaves his work site.

Where items 1 through 3 are complied with, official time may be authorized in advance by the first line supervisor. If, in an emergency, authorization cannot be obtained in advance, the time used must be requested and justified by the Union official and is subject to the approval (or disapproval) of the Branch Chief.

5. Preparation of comments on personnel issuances or other materials prepared by management and submitted to Union for comment—The Union should inform the supervisor or management representative of the amount of official time needed and get authorization.

Every employee should be able to comply with the reasonable request that he furnish satisfactory information as to his specific whereabouts. However, should an employee upon request fail to furnish information as to his whereabouts or should he furnish obviously unsatisfactory information, the immediate supervisor will initiate appropriate action to insure

proper certification of that employee's time and attendance record.

This instruction will be effective immediately upon issuance.

/s/ Charles M. Erisman
CHARLES M. ERISMAN

Approved /s/ Louis Zawatzky
Deputy Assistant Commissioner
for Employee Relations, SSA

Mr. Harold B. Siegel, Assistant Bureau Director, Program Operations
Mr. Thomas E. Bennett, Deputy Assistant Bureau Director, Field Operations
Mr. Edward D. Colleran, Director, Division of Administration
Dr. Harold I. Passes, Acting Chief Medical Officer
Mr. John P. McEleney, Assistant to the Director for Equal Opportunity and Labor Relations
Mr. Robert E. Harney, President, AFGE Local #2340

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973 526560 126